STATE OF MICHIGAN

COURT OF APPEALS

COUNTY TRANSFER STATIONS, INC., Plaintiff-Appellee,	UNPUBLISHED November 4, 2003
v	No. 236611 Lapeer Circuit Court
JOHN R. SAND & GRAVEL COMPANY, Defendant-Appellant.	LC No. 99-026484-CH

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals by leave granted an October 17, 2002, order and June 15, 2001, judgment of the circuit court requiring it to conditionally rebuild a road it destroyed and accommodate plaintiff's business. This case arose when defendant destroyed the only road leading to plaintiff's garbage transfer station by expanding a retention pond it used to clean gravel, stone, and sand it mined. This case returns to this Court after this Court ordered a remand for reconsideration of newly discovered evidence. On remand, the circuit court issued an October 17, 2002, order that modified, in part, its earlier judgment by providing:

> 3. Defendant is relieved from the prospective application of June 2001 judgment until plaintiff has shown that it has taken all necessary actions to have an operating business on the site, including:
>
> (a) Submit construction plans to the MDEQ for approval,
>
> (b) Submit an application for an operating license to the MDEQ for approval,
>
> (c) Contact Lapeer County and the MDEQ to have the Lapeer County 2001 Solid Waste Management Plan formally amended to include County Transfer's transfer station business, and
>
> (d) Submit a rezoning application to Metamora Township to have the property rezoned or obtain a zoning variance to allow the transfer station business to operate thereon.

> 4. If plaintiff receives notice from any appropriate governmental agency that its submission has been denied solely because County Transfer lacks access to its property and no appropriate governmental agency has denied plaintiff's submission for a reason other than lack of access, then defendant John R. Sand will be required to provide an access road which provides plaintiff with ingress to and egress from the transfer station parcel. The road shall be constructed in a manner such that it will be comparable to the road that was previously removed by the defendant and support multi-axle vehicles which must enter plaintiff's property in order to remove compressed garbage.

Defendant appeals as of right. We reverse.

I

In the mid-1950's Russell Parrish started a landfill operation on roughly 144 acres of land that he and his wife, Mildred, owned in Lapeer County. Dryden Road borders the property to the south and provides the only public access to the property. On August 1, 1969, while Russell's landfill was still operational, the Parrishes entered into a fifty-year mining lease with defendant. Pursuant to the terms of the mining lease, Parrishes' land was

> leased to the exclusive use of [defendant] for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, or which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all renovations, pits openings, ditches, roadways, and other improvements upon said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

According to the deposition testimony of the Parrishes' son, Eugene, defendant's mining operation and Russell's landfill cooperated with one another. Eugene testified that the landfill, which was located on the northern portion of the property, used a road that ran southward down the center of the property to Dryden Road. According to Eugene, the two businesses had an informal agreement that the mining operation would not interfere with the landfill's business, and Russell would advise defendant when they struck any sand or gravel while burying garbage. Eugene testified that Russell shut down the landfill in 1980 because the environmental regulations became too strenuous to keep the operation profitable. According to Eugene, in 1981, his parents leased him the northern portion of the property that his father had used for the landfill, and he built a transfer station, All-Star Rubbish Removal, Inc. Eugene testified that All-Star also cooperated with defendant during his operation of the transfer station.

Plaintiff purchased the ongoing transfer station business from All-Star on September 21, 1989. A week later it bought the parcel of land on which All-Star's buildings sat and the strip of land containing the road. The parcel lay in the northwest corner of the Parrishes' property and the sixty-six-foot-wide strip of land ran southward down its center. Eugene testified in his deposition that he expected defendant to continue cooperating during plaintiff's term of ownership, but he and his attorney carefully explained to Timothy L. Faulkender, plaintiff's president, that plaintiff's land ownership and operation were subject to defendant's mining rights. The deed plaintiff received from the Parrishes clearly states that the grant is "subject to" defendant's unrecorded lease, and a copy of the lease was attached to the deed.

Faulkender testified that the transfer station received garbage from the public and from garbage collectors. According to Faulkender, plaintiff then compacted the garbage and placed it into containers for transport to a landfill. Faulkender testified that the road provided the only access to plaintiff's transfer station, and plaintiff maintained the road despite the fact that defendant used its southern portion.

In the spring of 1998, plaintiff shut down the transfer station for renovations. Faulkender testified that when he returned to the site on December 3, 1998, he found that defendant had completely excavated a portion of the road. Defendant's president testified that the excavation was a necessary expansion of its retention pond. The damage to the road rendered the transfer station inaccessible.

On January 29, 1999, plaintiff sued defendant alleging breach of contract, conversion, and tortious interference with its business. The complaint also sought a declaration of rights between the companies. On January 3, 2000, defendant moved the trial court for summary disposition under MCR 2.116(C)(10), on the basis plaintiff could not establish that defendant owed plaintiff a duty regarding its mining operation. Two weeks later, plaintiff also moved for summary disposition, claiming that defendant's lease violated public policy by landlocking plaintiff's parcel. Following a hearing on March 6, 2000, the trial court denied defendant's motion for summary disposition, denied plaintiff's motion regarding money damages, but granted plaintiff's motion for summary disposition regarding its equitable claim that defendant must rebuild the road. Later, the trial court held a bench trial because "if it does go up on appeal, I do know that the Court of Appeals do [sic] like a settled record without necessarily having to hunt and dig for positions that the Court may have taken in [summary disposition] motions." Following the trial, the court again ordered defendant to rebuild the road and, in the future, "make accommodations" for plaintiff's business. This Court granted defendant's application for leave to appeal on October 30, 2001.

II

On appeal, defendant argues that the trial court clearly erred in ruling that defendant must conditionally rebuild the road and accommodate plaintiff's business. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 120. In evaluating such a motion, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* This Court reviews findings of fact made following a nonjury trial under a clearly erroneous standard. MCR 2.613(C).

The clear language of the deed and purchase agreement states that plaintiff's ownership of the land and operation of the transfer business was subject to defendant's gravel mining lease. While the circuit court sought to achieve an equitable result, it did not cite any controlling law supporting its finding that defendant must accommodate plaintiff's business on the lease land.

Contractual language should be given its plain and ordinary meaning. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Where contractual language is clear and unambiguous its construction is a question of law for the courts. *Id*. at 721-722. Parol evidence may not be used to vary the terms of an otherwise clear and unambiguous contract. *Id*. at 722.

Following our review, we conclude that both the purchase agreement and the warranty deed to the transfer station property clearly state that plaintiff's ownership of the business and the land is subject to defendant's mining lease covering the entire 153 acres originally owned by Russell and Mildred Parrish. There is no language in the mining lease that restricts defendant's right to mine sand and gravel on the entire 153-acre parcel in order to avoid harming other businesses located on the land. Nor does the evidence establish that defendant ever agreed not to act so as to harm plaintiff's transfer station business. While Eugene Parrish testified at deposition that he did not believe that defendant's mining operation would interfere with the transfer station, this was based on his own perceptions rather than any agreement between plaintiff and defendant. Plaintiff's use and ownership of its property was clearly subject to defendant's mining lease. Defendant had no reciprocal obligation to accommodate plaintiff's transfer station. Under these circumstances, the lower court clearly erred in granting summary disposition in favor of plaintiff rather than defendant.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen